

REMARKS

This is responsive to the Office Action mailed October 1, 2007, the period for response to which extends through February 1, 2008, with a one-month extension. Reconsideration of the application is respectfully requested.

The Examiner has withdrawn the § 112 rejection, but has continued the rejection of claims 1-45. Specifically, the Examiner has rejected claims 1-11 and 34-35 under § 102(b) as being anticipated by Randell et al. U.S. 5,378,559 ('559); rejected claims 12-14 under § 103(a) as being unpatentable over Randell et al. '559 or WO '03/73530 ('530); rejected claims 19-21 under § 103(a) as being unpatentable over Randell et al. '559 or WO '530 in view of Urry U.S. 6,022,639 ('639); rejected claim 23 under § 103(a) as being unpatentable over Randell et al. '559 or WO '530 in view of Durkot et al. U.S. 6,521,378 ('378); and rejected claims 24-33 under § 103(a) as obvious over Randell et al. '559 or WO '530 in view of Moore et al. U.S. Pub. 2005/0106461 ('461). Applicant traverses these rejections.

In the Examiner's response to Applicant's arguments made in the previous response, the Examiner states that Randell et al. '559 discloses an electrode containing a phosphate ester that would inherently possess the characteristics claimed in the instant application. The basis for this argument is that since the instant application discloses an electrode containing a rheological modifier and gives examples which are similar to one another, all materials falling within the disclosed genus would function as the claimed rheological modifiers when used in an electrode. While it is true that Randell et al. discloses a phosphate ester used in an electrode, the Examiner has presented no evidence that all phosphate esters have the claimed characteristics and specifically has not provided evidence that the phosphate esters of Randell et al. or WO '530 have the claimed characteristics. Thus, while the Examiner has provided the argument that a similar composition is disclosed in the prior art and, therefore, must possess the claimed characteristics, this is not necessarily true.

Therefore, because the Examiner has not shown that the phosphate esters of the prior art Randell et al. and WO '530 references *necessarily* possess the claimed characteristics, and the Examiner has not provided any evidence that they would indeed possess the claimed

Applicant : Alex T. Fensore III
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characteristics, the Examiner has not met the burden of establishing a *prima facie* case of anticipation. *See In re Rijchaert*, 28 U.S.P.Q.2d 1955, 1957 (Fed. Cir. 1933). The Examiner has not provided facts or technical reason to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the prior art. *In re Levy*, 17 U.S.Q.P.2d 1461, 1464 (B.P.A.I. 1990). Because the Examiner has not met his burden, specifically with regard to inherency, Applicant respectfully requests that the rejections of all of the claims be withdrawn.

CONCLUSION

The Applicant submits that the claims are in condition for allowance, notice of which is respectfully requested.

Respectfully submitted,

Dated: January 31, 2008

/Eugene J. Rath III/

Eugene J. Rath III, Reg. 25438
PRICE, HENEVELD, COOPER, DEWITT & LITTON, LLP
695 Kenmoor, S.E.
P.O. Box 2567
Grand Rapids, Michigan 49501
616.949.9610